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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 88

IRENE BARTSCH,

Petitioner,

—v.—

METRO-GOLDWYN-MAYER, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

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Dated: May 8, 1968.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Irene Bartsch respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 16, 1968.

Opinions Below

The opinion of the Court of Appeals has not been reported as of the date of the printing of this petition. A copy of said opinion is annexed hereto (App. pp. 31a-41a). The opinion of the United States District Court for the Southern District of New York (Bryan, *J.*) is reported at 270 F. Supp. 896 and is appended hereto (App. pp. 3a-16a).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit which is sought to be reviewed here (App. pp. 1a-2a) was entered on February 16, 1968. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Does a 1930 grant of motion picture rights in a copyrighted dramatic work include, in the absence of any evidence of so-called actual intent, the right to televise a motion picture based upon such copyrighted work?

2. Does a 1930 grant of the right to copyright, vend, license and exhibit (which is partially the standard language of 17 U. S. C. §1 (a), (d)) a motion picture include the right to exhibit it in any manner or by any method whatsoever, including the right to televise such motion picture?

3. In applying current public policy considerations to the interpretation of the scope of the 1930 grant, which considerations could not possibly have been considered by the parties or have been relevant in 1930, is a property right inherent in plaintiff's renewal copyright destroyed, and is she thereby deprived of her property without due process of law?

Statutes Involved

1. *Copyright Act.* Sections 1(a), (d) of the Copyright Act (17 U.S.C. §§1(a), (d)) provided as follows:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right"

(a) To print, reprint, publish, copy, and vend the copyrighted work;

* * *

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; * * *"

Statement

This petition, while involving the license for only one copyrighted work, is of paramount importance to both the motion picture and television industries. The television fare presented to the American public today consists to a great extent of motion pictures originally produced for theatrical exhibition. While it is true that many of these motion pictures were produced under copyright licenses entered into after the importance of rights to televise motion pictures was well recognized and full provided for in license agreements, it is equally true that a very significant number of these motion pictures were produced pursuant to copyright license agreements entered into before the complete significance of the right to televise a motion picture was recognized by the industry and did not specifically provide for these rights. In fact, as will be hereinafter shown and as, indeed, the Court of Appeals stated in its decision, the language used in the copyright license *sub judice* was not unique and was used in many

other copyright licenses executed at or about the time that the 1930 agreement here in issue was executed. Thus, the determination by the Court of Appeals, if permitted to stand without review, will affect not only the private rights of the litigants in this action, but will undoubtedly be considered as a binding precedent for the interpretation of a great number of copyright license agreements and will have extremely significant and important repercussions in both the motion picture and television industries. Repercussions in either of these industries, and certainly in both, will carry with it important consequences to the general public for whom television fare has become the principal staple of its recreation and amusement. Moreover, or of even greater significance, the determination of the Court of Appeals in effect defines two important rights under copyright which have not heretofore received such interpretation; viz., (i) motion picture rights include the right to televise and (ii) the right "to exhibit" (without more) carries with it the right to exhibit "it in any manner or by any method whatsoever.'

Prior to June 1, 1914, Rudolf Bernauer and Rudolph Schanzer wrote the dramatic work entitled "Wie Einst Im Mai" and on June 1, 1914 registered a claim of copyright for a term of 28 years in the Copyright Office of the United States.

By instrument dated January 23, 1930 (App. pp. 17a-19a), the aforesaid Schanzer and Bernauer, together with others who had contributed to the production of a musical version of the dramatic work, all granted to Hans Bartsch the sole and exclusive right

> "to use, adapt, translate, add to and change the said operetta or musical play and the title thereof in the making of motion picture photoplays, and to project,

transmit and otherwise reproduce the said work or any adaptation or version thereof, visually and audibly by the art of cinematography or any process analogous thereto, . . ."

By instrument dated May 12, 1930 (App. pp. 20a-29a), Hans Bartsch granted to Warner Bros. Pictures, Inc., certain rights he owned in "Wie Einst Im Mai" which were in almost *haec verba* limited and defined as they were in the grant he received from Schanzer, Bernauer, et al. (supra). Included in the grant from Hans Bartsch to Warner Bros., and of controlling significance in this action, was a license to Warner Bros. to use the work.

"in the making of motion picture photoplays, and to project, transmit and otherwise reproduce the said musical play or any adaptation or version thereof visually and audibly by the art of cinematography or any process analogous thereto, and to copyright, vend, license and exhibit such motion picture photoplays throughout the world."

In neither the grant to Hans Bartsch nor the grant from Hans Bartsch to Warner Bros. was there any mentioned or reference to either television, televising, transmission by television or transmission by any electronic or electromagnetic means whatsoever.

There is no evidence that when Hans Bartsch made his grant to Warner Bros. on May 12, 1930, he had any rights (other than stage production rights under an earlier agreement) in "Wie Einst Im Mai" other than those granted him by Schanzer, Bernauer, et al., in the instrument dated January 23, 1930. Paragraph 15 of the Bartsch/Warner argument (App. 28a) refers to the earlier Schanzer grant to Bartsch which involved publication rights in a stage production.

Subsequently, by instrument dated October 31, 1935, Hans Bartsch acquired from Schanzer his "share of the copyright . . . and all renewals thereof" in "Wie Einst Im Mai" and by instrument dated January 10, 1938, he acquired from Bernauer all of his "right, title and interest in and to the copyright . . . and all renewals thereof . . ." in "Wie Einst Im Mai".

On October 14, 1941, the Copyright Office issued a certificate of renewal of the "Wie Einst Im Mai" copyright to the authors Bernauer and Schanzer. On October 10, 1942, Bernauer in writing assigned his interest in the renewal copyright to Hans Bartsch. Schanzer made no additional transfer after the renewal copyright was registered; it appears, however, that the prior assignment of October 31, 1935, was sufficient in itself to transfer whatever interest he had in the renewal.

Bartsch died a New York resident on July 10, 1952. His will was duly admitted to probate on September 3, 1952, and letters testamentary were on that day granted to petitioner Irene Bartsch. Pursuant to the terms of the will Mrs. Bartsch, as executrix, transferred all of her husband's interest in the "Wie Einst Im Mai" renewal copyright to herself. In this suit for infringement she seeks to enforce rights obtained under this assignment.

The defendant, Metro Goldwyn Mayer, succeeded to all rights of Warner Bros., and having also acquired the rights of others having an interest in the musical play "Maytime", made a successful motion picture titled "Maytime" which starred Jeanette McDonald and Nelson Eddy and released the same for exhibition in theatres in 1937 and thereafter.

Other grants (which have been recorded in the United States Copyright Office) made both to Warner Bros. and other motion picture producers in 1930 were introduced

by the defendant. They show that the same language employed in the Bartsch/Warner Bros. grant was employed in these grants and that these particular grants in 1930 did not include specific reference to the right to televise motion pictures made pursuant thereto.

On the other hand, plaintiff introduced a series of seven grants of rights made to Warner Bros. in 1930, (also recorded in the United States Copyright Office) some dated a few months before and some within three months after the grant made by Hans Bartsch to Warner Bros. These exhibits were offered for the purpose of proving that in 1930 Warner Bros. was cognizant of the possibility that television might some day be a medium for the exploitation of motion pictures made pursuant to these grants and that at least in these instances, when Warner Bros. bargained for the right to televise these pictures, it received an unrestricted right employing the word "television" or some derivative thereof.

The present controversy arose when during 1958 the defendant Metro Goldwyn Mayer commenced licensing the motion picture "Maytime" for exhibition on television and the plaintiff's protests that her copyright was being infringed went unheeded by the defendant.

Judge Bryan, after trial, found for the defendant. The Court of Appeals affirmed the District Court, but the Court of Appeals did write in its opinion that ". . . the issue seems considerably closer to us than it did to Judge Bryan."

The Court of Appeals did not agree with Judge Bryan that the provisions in the license agreement giving the licensee the right to reproduce the motion picture made "by the art of cinematography or any process analogous there-

to" included the right to televise the same. On this point, the Court of Appeals wrote:

> "We have grave doubt on that score. We freely grant that 'analogous' is a broader word than 'similar,' and also that the first step in a telecast of a film, namely, the projection of the motion picture to an electronic pickup, is 'analogous' to throwing the picture on a theatre screen. But to characterize the to us nigh miraculous processes whereby these images actuate airwaves so as to cause electronic changes in sets in millions of homes which are then 'unscrambled' or 'descanned' and thus produce pictures on television screens—along with the simultaneous electronic transmission of sound—as 'analogous' to cinematography pushes the analogy beyond the breaking point. This is particularly so since the district court's construction would seem to lead to the conclusion that the assignment would entitle the assignee to 'project, transmit and otherwise reproduce' the musical play by a live telecast—a right which pretty clearly was not granted and indeed has not been claimed." (App. pp. 35a-36a).

Rather, the Court of Appeals stated that the decision to affirm was on the ground that the language "to copyright, vend, license and exhibit such motion picture photoplays throughout the world" included the right to license the telecasting of the picture. The Court of Appeals went on to hold that televising a motion picture would lie within the "ambiguous penumbra" of the rights granted by Bartsch in 1930 and favored a "broader view" because

> "it provides a single person who can make the copyrighted work available to the public over the penumbral medium, whereas the narrower one involves the

risk that a deadlock between the grantor and the grantee might prevent the work's being shown over the new medium at all." (App. p. 41a).

Reasons for Granting the Writ

A. The Court of Appeals in determining that the 1930 Bartsch/Warner grant of motion picture rights in a copyrighted work and the right to exhibit such motion picture included a license under the copyright to televise the motion picture improperly expanded the scope of the grant of such rights and the meaning of such rights under the Copyright Law.

The 1930 agreement, after granting "the motion picture rights throughout the world in and to a certain musical play 'Wie Einst Im Mai,'" elaborated and defined the scope of the grant as follows:

> ". . . together with the sole and exclusive right to use, adapt, translate, add to, subtract from, interpolate in and change said musical play, and the title thereof, (subject so far as the right to use said title is concerned to Paragraph 7 hereof) in the making of motion picture photoplays and to project, transmit and otherwise reproduce the said musical play or any adaptation or version thereof visually and audibly by the art of cinematography or any process analogous thereto, and to copyright, vend, license and exhibit such motion picture photoplays throughout the world . . ." (App. pp. 22a-23a).

Much of the testimony at the trial consisted of that of an expert called by the defendant who testified as to whether or not the process of television is "analogous" to the "art of cinematography" and within the scope of that particular clause of the grant (*supra*). Although Judge

Bryan decided that the art or process of television came within the said phrase, the Court of Appeals expressed "a grave doubt on that score" and felt that Judge Bryan had pushed the "analogy beyond the breaking point" (App. p. 36a).

The Court of Appeals held that the decisive phrase on which decision herein turned was the right granted "to copyright, vend, license and exhibit such motion picture photoplays throughout the world." This language constitutes a part of 17 U. S. C. 1 (a) and 1(d) and, therefore, presents a question of interpretation of an Act of Congress.

Moreover, this decisive phrase followed immediately that which granted the licensee the right "to project, transmit and otherwise reproduce the said musical play and any adaptation or version thereof, visually and audibly, by the art of cinematography or any process analogous thereto . . ." It is submitted that the doctrine of *einsdem generis* should apply and the right of the licensee to copyright, vend, etc. should be construed as being applicable to exhibition only by the processes mentioned in the immediately preceding phrase.

The Court of Appeals in effect rejected the application of the doctrine of *einsdem generis* by holding:

> "The 'to project, transmit and otherwise reproduce' language appears rather to have been directed at how the musical play was to be made into a photoplay." (App. p. 36a)

The language of the grant shows that the Court of Appeals was patently in error for at least two reasons in holding that said language appears to have been directed as to how the musical play was to be made into a photoplay or, in other words, how it was to be produced:

(a) The verbs to "project" and "transmit" can have nothing to do with how the copyrighted work is to be made into a motion picture. *After* the motion picture is produced, it is then projected or transmitted.

(b) The clause in the agreement immediately preceding the phrase containing the verbs "project" and "transmit" addresses itself to production or how the motion picture is to be produced. The agreement gives the right to the licensee to "use, adapt, translate, add to, subtract from, interpolate in and change said musical play, and the title thereof, . . ." (App. p. 22a) This is the language of the agreement addressed to how the motion picture is to be made.

After so granting the right to make or produce the picture, the agreement then addresses itself to the licensee's right to use the production by granting and limiting the right "to project, transmit and otherwise reproduce the said musical play . . . visually and audibly by the art of cinematography or any process analogous thereto," and adds to this right and limitation the right "to copyright, vend, license and exhibit such motion picture photoplays throughout the world."

The Court of Appeals held that by the first above granted clause the licensee did not get the right to televise the motion picture because television was not a process analogous to the art of cinematography, but that the second clause did give the licensee the right to "exhibit" the copyrighted motion picture by a telecast. Here, the Court fell into error because the rights granted to copyright, vend, license and exhibit the picture could be deemed applicable only to the media embodied in the "art of cinematography or any process analogous thereto." It does violence to logic to hold that the parties limited the licensee's right to pro-

ject the picture by the art of cinematography or any process analogous thereto, and then in the very next phrase intended to grant the licensee the right to exhibit the motion picture in any medium. If the Court of Appeals' reasoning is to be adopted, the whole phrase beginning "to project, transmit . . ." could and should have been eliminated because the right to exhibit found in the next clause of the grant gives, according to the Court of Appeals, the right to the licensee to exhibit in any medium, including television.

The Court of Appeals held (App. p. 38a) that the words of Bartsch's assignment "were well designed to give the assignee the broadest rights with respect to *its* copyrighted property." The Court of Appeals emphasized the fact that to "exhibit" means to "display" or to "show" by any method, and nothing in the rest of the grant sufficiently reveals a contrary intention." (App. p. 38a) As has heretofore been shown, this statement completely disregards the restriction that the projection or transmission of the picture was to be done by the "art of cinematography or any process analogous thereto." Furthermore, even today, when television is such an integral part of American life, the word "exhibit" is rarely, if ever, used in connection with a television performance. The words "televising" or "telecasting" have practically become words of art in the English language. Certainly, in 1930, the word "exhibit" could not have been deemed by the parties to have been a description of the process of televising a motion picture. It is not so used even today.

The Court of Appeals held that an experienced businessman such as Bartsch "is bound by the natural implications of the language he accepted when he had reason to know of the new medium's potential." (App. p. 38a)

Certainly, the Court of Appeals could not have believed that Bartsch's sophistication or experience exceeded that of the other party to the agreement—Warner Bros. As a matter of fact, there was irrefutable evidence in the form of publicly recorded documents that in 1930, when Warner Bros. acquired the right to televise motion pictures along with other rights, it did so directly and not by implication. There were introduced in evidence seven grants of rights filed in the Copyright Office of the United States whereby Warner Bros., within a period commencing four months before the Bartsch/Warner grant and ending three months thereafter, obtained grants from prominent authors or producers, whose sophistication and experience at least equalled if it did not exceed that of Hans Bartsch, which used the word "television" or "televising" when such words were intended to be included in the grant. On January 9, 1930, Victor Herbert granted Warner Bros. motion picture rights in "The Fortune Teller" and his right, title and interest "to televise and broadcast . . . said motion pictures." On July 14, 1930, David Belasco granted Warner Bros. the right to radio broadcast and televise photoplays made from his work "The Girl of the Golden West." Similar specific language is found in a grant from Rafael Sabatini dated January 20, 1930, to rights in his book "Captain Blood," from Booth Tarkington in a grant dated February 7, 1930 in his book "The Magnificent Ambersons," and from other prominent and sophisticated people in the literary field, including George Ade, Grace Oursler and Faith Baldwin.

The Court of Appeals dismissed this argument, stating that "Warner Brothers may have decided that, in dealing with Bartsch, it would be better tactics to rely on general words that were sufficiently broad rather than seek an express inclusion . . ." (App. p. 39a) But the Court of Appeals

in this very opinion held that the limitation of the right to "project, transmit and reproduce" was only by the means of the art of cinematography or any process analogous thereto and did not include the right to televise the motion picture. It is a far fetched conjecture that Warner Bros. would rely on this general language when it was simultaneously acquiring similar rights from others by the literal use of the word "televise." It is quite apparent that both parties were aware of the possibilities of televising future motion pictures. No explanation was offered why Warner Bros. in other instances occurring in or about the time of the Bartsch grant specifically included television rights, but omitted the same here.

There are at least three probable reasons why Bartsch did not express a specific reservation of television rights in the agreement:

(a) He did not have them in 1930. The only rights Bartsch had in 1930 were those granted him by Schanzer, Bernauer, et al., in the agreement dated January 23, 1930 (App. pp. 17a-19a), and certain other rights not material hereto which he obtained in stage productions under a 1925 agreement with G. Schirmer & Co.

(b) Bartsch being an experienced businessman knew that a license would not be expended beyond the specific terms thereof and that the absence of any grant of television rights, particularly when they were being mentioned in other grants taken by the same grantee, would suffice to reserve television rights, if, in fact, he had any.

(c) The general reservation of rights contained in paragraph 13 of the license agreement (App. p. 27a) and dismissed by the Court of Appeals in a footnote as not "standing for more than the truism that whatever Bartsch had not granted, he had retained", was deemed safer than list-

ing all retained rights because the omission of any one right in such a listing, would perhaps be considered evidence of an intention to grant said right pursuant to the maxim *inclusio unius est exclusio alterius.*

Two cases which were decided by Circuit Courts of Appeals and which the Supreme Court declined to review by the denial of certiorari are in point:

While not on all fours with the instant case as far as facts are concerned, the reasoning and language in Warner Bros. Pictures Inc. v. Columbia Broadcasting System, Inc., 102 F. Supp. 141 (S.D.Cal., 1951), aff'd, 216 F. 2d 945 (9th Cir. 1954) cert. denied 348 U. S. 971 (1955) is apposite. In this case Warner Bros. had acquired the right to make a motion picture of the famous mystery story "The Maltese Falcon" and had also acquired the rights to televise said motion picture. This grant also was made to Warner Bros. in 1930. After "The Maltese Falcon" had become as successful a motion picture as it had been a novel, the Columbia Broadcasting System obtained from the author of the book the right to use the principal characters of "The Maltese Falcon" in other stories to be included in a radio series. Warner Bros. which had obtained radio rights to "The Maltese Falcon" from the author in the original grant sought to enjoin the use of the characters by Columbia Broadcasting System in the stories on the ground that the original grant to Warner Bros. carried with it all the radio rights in the characters in the novel. Both the District Court Judge and the Circuit Court panel refused to accept the contention of Warner Bros., both holding that any grant of rights in literary property must be limited by the language of the grant itself and the Court would not undertake to remake the contract for the parties and extend general language to cover either omitted or forgotten specific situations.

Ettore v. Philco Television Broadcasting Corp., 229 F. 2d 481, cert. den., 351 U. S. 926, construed according to Pennsylvania law a contract entered into in 1936. Ettore, a professional boxer, contracted in 1936 to box Joe Louis. In the contract for the bout Ettore granted "motion picture rights to his boxing contest" (487). Almost twenty years after the bout the motion pictures of the fight were shown on television without Ettore's consent. The United States Court of Appeals for the Third Circuit held, first of all, the Pennsylvania law governed the interpretation of Ettore's contract with the promoter (490). The Court then posed the question crucial to the instant case in the following terms,

> "Is telecasting a motion picture an essentially different use than that to which the film would be put if shown in motion picture houses?"

After considering the wording of the contracts, many cases cited in the opinion and the fact that Ettore had put no contractual limitation on the use of the motion pictures in the contract, the Court held as follows:

> "It must be conceded that television is a new medium for the presentation of motion pictures. Ordinarily a motion picture film is projected by a projector by rays of light cast on a screen. There is no direct interposition of electrical energy. But when a film is telecast, there is the interposition of electric impulses which carry the picture to receiving sets where it is reproduced by rays of light for the eyes of the spectator. It may be fairly said, we think that this is a new use of the film and one which was not in commercial existence at the time Ettore made his contract" (488).

Here is clear authority that a contract made in 1936 and conveying "motion picture rights," even though no con-

tractual limitation was put on the use of these motion pictures, did not include the right to televise these motion pictures.

B. The Court of Appeals by applying 1968 considerations of public policy to the interpretation of a grant made in 1930 has deprived the plaintiff of her property in the renewal copyright without due process of law.

In 1930, commercial television was not yet a factor in American life. Experimentation was still going on although people in the entertainment business knew that sooner or later commercial television would be a reality. But in 1930, no one did and no one could possibly have foretold to what extent television would transform the entertainment habits of Americans and the great and, indeed, the major impact which the televising of feature motion pictures originally produced for theatrical exhibition would have. Certainly, nothing in the 1930 license agreement between Bartsch and Warner Bros. indicates any recognition of this fact. There was no evidence in 1930 that this was considered by people in the entertainment business.

The Court of Appeals concludes its opinion by applying present day standards of public policy to this action and determining that it is better to "make the copyrighted work available to the public over the penumbral medium" (App. p. 41a) than run "the risk that a deadlock between the grantor and the grantee might prevent the work's being shown over the new medium at all." (App. p. 41a) It is doubtful whether there is any overriding consideration of public policy which requires taking away from the owner of a copyright a significant part of the monopoly granted her by that copyright. Chopping down the benefits which the Copyright Law is designed to confer is a deprivation

of property without due process, and the Court of Appeals deprived the plaintiff of her property without due process of law in order to make a single motion picture available to the public on television without adequate compensation to the owner of the copyright of the story on which the picture is based.

CONCLUSION

The Supreme Court is being presented with many cases involving television and, especially, the interaction of the Copyright Law and the exigencies of filling the television screen. This is inevitable because television, although a recent phenomenon on the American scene, has become something of a monster in our culture and civilization—for good or for evil, we do not say or argue. The instant case, although it deals with only one motion picture, is of overriding importance because the rights to televise hundreds or maybe thousands of motion pictures made in the late 1920s or early 1930s are involved. Also, there are many important literary properties for which motion picture rights were sold at that time and which rights have not yet been exercised. The retained television rights under copyright of such authors is a matter of major significance and should not be left in a twilight zone so as to destroy their value to the authors. The issues in this case involve paramount questions of copyright law and due process. For these reasons, this case involves sufficient public importance to warrant consideration by the Supreme Court. The District Court and the Court of Appeals, although reaching the same judgment, were in conflict on almost every substantial point of decision involved in this

case. For these reasons, the Court is respectfully requested to grant this petition for certiorari.

Respectfully submitted,

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